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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 472

BETTY STODDARD HORN, BARBARA STODDARD KIRKLAND, LOUIS E. STODDARD JR.; AND ETHEL S. GARRETT AND THE UNION TRUST COMPANY OF PITTSBURGH, AS CO-EXECUTORS AND CO-TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF HARRY DARLINGTON, JR., DECEASED, *Appellants,*

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION, *Appellee*

APPEAL FROM THE SUPREME COURT OF ILLINOIS No. 30880

THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 472

BETTY STODDARD HORN, BARBARA STODDARD KIRKLAND, LOUIS E. STODDARD JR.; AND ETHEL S. GARRETT AND THE UNION TRUST COMPANY OF PITTSBURGH, AS CO-EXECUTORS AND CO-TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF HARRY DARLINGTON, JR., DECEASED, *Appellants*,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION, *Appellee*

APPEAL FROM THE SUPREME COURT OF ILLINOIS No. 30880

THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY

STATEMENT BY APPELLEE OF MATTERS AND GROUNDS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

MAY IT PLEASE THE COURT:

City of Chicago, a municipal corporation, the appellee herein, respectfully presents the following matters and grounds making against the jurisdiction of this court of the appeal herein.

Statement of the Case

The pertinent facts, all of which are undisputed, show the following: On April 4, 1938, the appellants commenced an action at law in the Circuit Court of Cook County, Illinois, to recover damages for claimed injury to their abutting property by reason of the construction by appellee of a viaduct along a public thoroughfare for the purpose of facilitating the flow of traffic thereon. No part of appellants' property was physically invaded by the improvement, the entire structure (including the caissons upon which it rested) being confined within the limits of the public street, and the only consequences claimed by appellants are that their easements of light, air, view, accessibility, ingress and egress have been seriously affected.

Appellee filed a motion to dismiss on the ground that the action had been instituted more than five years after its accrual, and was therefore barred by the five-year statute of limitations applicable to actions to recover damages for injuries to real property. In support of its motion to dismiss, appellee filed affidavits showing that the improvement was completed on April 29, 1931, which, under settled state law, was when the cause of action for damages had accrued.

Appellants filed objections to appellee's motion to dismiss, in which they contended, in substance, that to deprive them of their easements of light, air, view, accessibility, ingress and egress was tantamount to a "taking" of their property, and that to remit them to an action at law for damages, and to apply the five-year statute of limitations in bar of such action, deprived appellants of their property without due process of law in violation of the Fourteenth Amendment of the United States Constitution.

The trial court sustained appellee's motion to dismiss, and entered final judgment dismissing the action at ap-

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pellants' costs. The Supreme Court of Illinois affirmed the judgment, holding (1) that, in the circumstances presented, there was no "taking" of appellants' property but merely a consequential "damaging" thereof; (2) that no constitutional rights of appellants, either under the State or Federal Constitutions, were infringed by remitting appellants to an action at law for damages for any injury claimed to have been done to their property; and (3) that the action here was properly dismissed because not instituted within the five-year period of limitations prescribed by state statute for such actions.

I

The judgment of the Supreme Court of Illinois does not constitute a decision in favor of the validity of the five-year statute of limitations, nor was the validity of that statute drawn in question on any asserted ground of repugnancy to the Federal Constitution.

The state statute, the validity of which appellants claim was drawn in question in the case at bar and its validity affirmed by the judgment here appealed from, is Section 15 of "An Act in regard to limitations", approved April 4, 1872, which reads, in pertinent part, as follows:

> "Actions • • • to recover damages for an injury done to property, real or personal, • • • and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." (Chap. 83, Par. 16, Ill. Rev. Stat. 1949, Vol. 2, p. 47).

Appellants contend that the application of the bar of the five-year statute of limitations to the action here was tantamount to a decision in favor of the validity of the statute, and hence gives this court jurisdiction of the appeal

by virtue of the provisions of Section 1257 of the Judicial Code which, in pertinent part, reads a follows:

> "Judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • • • • • •
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity." (Title 28, United States Code, Section 1257.)

It is appellee's position that the validity of the statute was neither drawn in question nor decided, for it readily appears that the judgment appealed from rests upon the basic determination that there was no "taking" of appellants' property because no part thereof had been physically invaded or actually appropriated by the public improvement, and that appellants' remedy was by way of an action at law to recover consequential damages. As clearly appears from the record, the claim of appellants that the five-year statute should not have been applied was predicated entirely upon their contention that the effect of the street improvement upon their easements of light, air, view, accessibility, ingress and egress constituted a "taking" of their property, notwithstanding that there was no physical invasion of their property. The court's ruling that the five-year statute was applicable flowed not from any decision as to the validity of said statute but from the court's conclusion that appellants' property had not been "taken" but merely damaged as a consequence of the street improvement.

Thus the question presented on this appeal is not the *validity* of the state statute but its *applicability* to a "non-

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taking" case. This, we submit, is not a ground of appeal within Section 1257 of the Judicial Code.

II

Quite apart from the mode of review here sought, the appeal should be dismissed or the judgment affirmed because no substantial Federal question is presented.

As pointed out above, the basic issue decided by the Supreme Court of Illinois is that no taking of private property for public use is involved where the public improvement does not result in any physical invasion or actual appropriation of any portion of an owner's property, but merely in a consequential damaging thereof by reason of affecting easements of light, air, view, accessibility, ingress and egress.

Appellants claim that the court erred in so holding. Such a contention, of course, does not present any question under the Federal Constitution. (*Chicago Life Insurance Co.* v. *Cherry*, 244 U. S. 25, 30; *Ballard* v. *Hunter*, 204 U. S. 241, 258).

However, since we are coupling our motion to dismiss with a motion to affirm, we should like to point out that the ruling of the Supreme Court of Illinois on this issue is in accordance not only with the law of Illinois but of many other state jurisdictions, as well as of this court. We quote from the opinion of the Supreme Court of Illinois as follows:

> "The test applied by this court and also by the Federal court, in determining whether real estate has been taken for public use within the meaning of our constitution, is whether there has been an actual physical invasion of the tangible property." (*People ex rel. Pratt* v. *Rosenfield*, 399 Ill. 247; *Kane* v. *City of Chicago*, 392 Ill. 172; *People ex rel. Tyson* v. *Kelly*, 379 Ill. 297; *Cuneo* v. *City of Chicago*, 379 Ill. 488; *Barnard*

v. *City of Chicago*, 270 Ill. 27; *Otis Elevator Co.* v. *City of Chicago*, 263 Ill. 419; *Schroeder* v. *City of Joliet*, 189 Ill. 48; *Northern Transportation Co.* v. *City of Chicago*, 99 U. S. 635.)."

The Illinois rule is not unique on this point, but has been followed in many other jurisdictions where the courts have held that where there is no physical invasion, there is no "taking" of property in the constitutional sense, and the appropriate remedy in such instance is an action at law for consequential damages. (*DeLucca* v. *City of North Little Rock*, (C. C. E. D. Ark. W. D.) 142 Fed. 597; *Brown* v. *City of Atlanta*, 145 S. E. 855, 167 Ga. 416; *Hurt* v. *City of Atlanta*, 28 S. E. 65, 100 Ga. 274; *Hill-Behan Lumber Co.* v. *Skrainka Const. Co.*, 106 S. W. (2d) 483, 341 Mo. 156; *Guaranty Savings & Loan Ass'n.* v. *City of Springfield*, 139 S. W. (2d) 955, 957, 346 Mo. 79; *McCammon & Lang Lumber Co., et al.* v. *Trinity & B. V. Ry. Co.*, 133 S. W. 247, 104 Tex. 8; *Dynes* v. *Town of Kilkenny*, 189 N. W. 439, 440, 153 Minn. 11; *City of Delphi* v. *Evans*, 36 Ind. 90, 96; *State ex rel. Dawson* v. *Parsons St. Ry. & Elec. Co., et al.*, 105 Pac. 704, 705; 81 Kan. 430; *Overholser, et al.* v. *Interurban Traction Co.*, 119 Pac. 127, 131-132; 29 Okl. 571; *Denver & S. F. R. Co.* v. *Domke*, 17 Pac. 777, 781; 11 Colo. 247; *In re Locust Street Subway*, 179 Atl. 741, 319 Pa. 161; *King* v. *City of Rolla*, 130 S. W. (2d) 697, 234 Mo. App. 16.)

Appellants make much of the fact that the erection of the improvement necessitated the sinking of caissons in the street to support the viaduct, and that this constituted a permanent appropriation, and hence a "taking", of the necessary sub-highway space for that purpose, to the exclusion of appellants' right to the use thereof as owners of the fee to the center of the street. On this point, the Supreme Court of Illinois held that the use of such sub-highway space for the purpose of sinking caissons to sup-

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port the viaduct was wholly within the dominant public easement of use of the street for purposes of public travel, hence imposing no additional servitude upon appellants' property, and did not constitute a "taking" of any part thereof. The opinion of the Illinois Supreme Court answered appellants' contention on this issue in the following words:

> "Appellants contend that inasmuch as they own the fee to the center of the street, consequently the filling in of the sidewalk space in the streets adjacent to their property amounted to a taking of their private property for public use. It is admitted that appellants' ownership of the fee is subject to an easement in favor of the public for street purposes. The easement for a street includes such use of the land at or beneath the surface as will make the easement effective, and for that purpose the public authorities may change the grade of the street and the owner of the fee has no right to interfere. (*City of Dixon* v. *Sinow & Weinman*, 350 Ill. 634.) • • • The appropriation of sidewalk space in the construction of a street improvement does not impose additional servitude on the fee and does not amount to a taking of the fee owner's property. It is not a subjection of the fee to a new and additional burden or easement, but is merely the exercise or continuation of the burden or easement to which it was already subject. Hence, such an appropriation of sidewalk space does not come within the constitutional prohibition that private property shall not be taken or damaged for public use without just compensation."

Appellants take the position that the decision of the Illinois Supreme Court that no "taking" of property was involved under the facts of the instant case is contrary to the decisions of the courts of other states. We have already indicated that the courts of last resort of many other state jurisdictions hold views in conformity with

those expressed by the Illinois Supreme Court in the opinion at bar. However, even if there be contrariety of opinion among the several states on this proposition, it does not follow that the ruling of the Supreme Court of Illinois in the case at bar presents any federal constitutional question for decision by this court. Indeed, this court has definitely held that the question of whether the impairment of an easement by a public improvement constitutes a "taking" of property where there has been no physical invasion or actual appropriation of any part of an owner's property, presents merely a question of local property law, and that a determination upon such a question by the highest court of a state will be accepted by this court as conclusive upon it and, further, that it is not within the province of this court to compel conformity between the decisions of the several states upon that proposition.

In *Sauer* v. *City of New York,* 206 U. S. 536, the City of New York, pursuant to lawful authority, constructed an elevated iron viaduct for public travel along a public street, as a result of which plaintiff's access to his abutting property and the free and uninterrupted use of light and air were impaired. Plaintiff brought an action to enjoin the city from maintaining the viaduct, or, in the alternative, for the recovery of damages caused thereby. There was judgment for the city, which was affirmed on appeal, and plaintiff sued out a writ of error to this court on the ground that he had been deprived of his property without due process of law, in that his property had been taken without compensation, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, a contention similar to the one made by the appellants here. This court recognized that such easements constituted property rights, but were so far subservient to the dominant right of the public to all legitimate uses of the street for public travel that plaintiff did not sustain any "damage"

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in the legal or constitutional sense for which any recovery could be had. At pages 543-544, this court said:

> "The plaintiff now contends that the judgment afterwards rendered by the Supreme Court of New York, in conformity with the opinion of the Court of Appeals, denied rights secured to him by the Federal Constitution. This contention presents the only question for our determination, and the correctness of the principles of local land law applied by the state courts is not open to inquiry here, unless it has some bearing upon that question. But it may not be inappropriate to say that the decision of the Court of Appeals seems to be in full accord with the decisions of all other courts in which the same question has arisen. The state courts have uniformly held that the erection over a street of an elevated viaduct, intended for general public travel and not devoted to the exclusive use of a private transportation corporation, is a legitimate street improvement equivalent to a change of grade; and that, as in the case of a change of grade, an owner of land abutting on the street is not entitled to damages for the impairment of access to his land and the lessening of the circulation of light and air over it. *Selden* v. *Jacksonville*, 28 Florida, 558; *Willis* v. *Winona*, 59 Minnesota, 27; *Colclough* v. *Milwaukee*, 92 Wisconsin, 182; *Walish* v. *Milwaukee*, 95 Wisconsin, 16; *Home Building Company* v. *Roanoke*, 91 Virginia, 52 (cited with apparent approval by this court in *Meyer* v. *Richmond*, 172 U. S. 82, 95); *Willetts Manufacturing Co.* v. *Mercer County*, 62 N. J. Law, 95; *Brand* v. *Multnomah County*, 38 Oregon, 79; *Mead* v. *Portland*, 45 Oregon, affirmed by this court in 200 U. S. 148; *Sears* v. *Crocker*, 184 Massachusetts, 586; (*Semble*) *DeLucca* v. *North Little Rock*, 142 Fed. Rep. 597."

This court then quoted from the case of *Willis* v. *Winona*, 59 Minn. 27, as follows:

> " 'The doctrine of the courts everywhere, both in England and in this country (unless Ohio and Kentucky are excepted), is that so long as there is no application of the street to purposes other than those of a highway, any establishment or change of grade made lawfully, and not negligently performed, does not impose an additional servitude upon the street, and hence is not within the constitutional inhibition against taking private property without compensation, and is not the basis of an action for damages, unless there be an express statute to that effect. That this is the rule, and that the facts of this case will fall within it, is too well established by the decisions of this court to require the citation of authorities of other jurisdictions. . . .' " (206 U. S. 536, at p. 545.)

This court then pointed out that the question of the correctness of the rule adopted by the state court did not present any question under the Federal Constitution, and that it would accept the state court determination as conclusive upon it. At pages 545-546, this court said:

> "But, as has been said, we are not concerned primarily with the correctness of the rule adopted by the Court of Appeals of New York and its conformity with authority. This court does not hold the relation to the controversy between these parties which the Court of Appeals of New York had. It was the duty of that court to ascertain, declare and apply the law of New York, and its determination of that law is conclusive upon this court."

This court then proceeded to consider the question whether plaintiff had been denied the due process of law secured to him by the Fourteenth Amendment, in that the law of New York denied him any compensation whatever for the damage to his easements of light, air, and access, and that

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no remedy was provided by state law therefor. In this respect the *Sauer* case presented an even stronger situation for intervention by this court than the case at bar where a remedy is provided in such a case by way of an action at law for damages.

This court held that no denial of due process of law was involved, saying at pages 547-548:

> "Has the plaintiff been deprived of his property without due process of law? The viaduct did not invade the plaintiff's land. It was entirely outside that land. But it is said that appurtenant to the land there were easements of access, light and air, and that the construction and operation of the viaduct impaired these easements to such an extent as to constitute a taking of them. The only question which need here be decided is whether the plaintiff had, as appurtenant to his land, easements of the kind described; in other words, whether the property which the plaintiff alleged was taken existed at all. The court below has decided that the plaintiff had no such easements; in other words, that there was no property taken. It is clear that under the law of New York an owner of land abutting on the street has easements of access, light and air as against the erection of an elevated roadway by or for a private corporation for its own exclusive purposes, but that he has no such easements as against the public use of the streets or any structures which may be erected upon the street to subserve and promote that public use. The same law which declares the easements defines, qualifies and limits them. Surely such questions must be for the final determination of the state court. It has authority to declare that the abutting land owner has no easement of any kind over the abutting street; it may determine that he has a limited easement; or it may determine that he has an absolute and unqualified easement. The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the States, and the decisions have been conflicting, and

> often in the same State irreconcilable in principle. The courts have modified or overruled their own decisions, and each State has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy. As has already been pointed out, this court has neither the right nor the duty to reconcile these conflicting decisions nor to reduce the law of the various States to a uniform rule which it shall announce and impose. Upon the ground, then, that under the law of New York, as determined by its highest court, the plaintiff never owned the easements which he claimed, and that therefore there was no property taken, we hold that no violation of the Fourteenth Amendment is shown."

It is submitted that this court, in the *Sauer* case, has disposed of all the contentions of appellant against them from the standpoint of any issues sought to be raised under the Federal Constitution. Appellants cite numerous cases to the effect that easements of light, view, air, access, ingress and egress are property rights, and that deprivation or impairment of such easements requires the payment of compensation therefor. This is true where a state law so provides, and the law of Illinois is not to the contrary. These cases have no application here, however, because appellants have been accorded an adequate remedy for the recovery of such compensation in an action at law, and it is only because of their delay in bringing such action that recovery has been denied.

Cases like *Chicago, Burlington & Quincy R. R. Co.* v. *City of Chicago*, 166 U. S. 226, urged upon this court by appellants, are likewise sharply distinguishable from the case at bar. There the city condemned a right of way over the railroad's property, thus involving an actual physical invasion, notwithstanding that what the city took was not a fee title but merely an easement to cross. This Court con-

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sidered that this constituted an actual appropriation of the railroad's property for public use, and that it would undertake to inquire whether the state court judgment complained of was "in absolute disregard" of the "owner's right to just compensation." In the case at bar, however, there was no physical invasion of appellants' property, not even to the extent of an easement through, over and upon appellants' property, nor was there any denial of appellants' right to recover just compensation. On the contrary, the right of an owner to recover just compensation for property damaged for public use is clearly recognized by the decision of the Supreme Court of Illinois here appealed from.

In view of the claim by appellants that the decision in the case at bar constitutes a departure from established Illinois law on the issues involved, we should like to enumerate at this point the propositions of law decided by the Supreme Court of Illinois in the case at bar, together with the prior decisions of that court in support thereof.

(1) Where there is no physical invasion of the owner's property, the destruction or impairment of easements of accessibility, light, air and view, due to the construction of a public improvement in a proper and lawful manner, is not a "taking" of property within the meaning of Article II, Section 13, of the Illinois Constitution. (*People ex rel. Pratt* v. *Rosenfield*, 399 Ill. 247, 251-252; *Kane* v. *City of Chicago*, 384 Ill. 361, 367-368, 392 Ill. 172, 179; *People ex rel. Tyson* v. *Kelly*, 379 Ill. 297, 306-308; *Barnard* v. *City of Chicago*, 270 Ill. 27, 31; *Schroeder* v. *City of Joliet*, 189 Ill. 48, 53; *Penn Mutual Life Ins. Co.* v. *Heiss*, 141 Ill. 35, 43.)

(2) The use of sub-sidewalk space for the purpose of sinking caissons to support the viaduct was within the dominant public easement of use of the street for public travel. Hence it did not impose an additional servitude

upon plaintiffs' fee title to the center of the street, and did not constitute a "taking" of any part of their property. (*Kane* v. *City of Chicago*, 384 Ill. 361, 364, 368; *S. D. Childs & Co.* v. *City of Chicago*, 279 Ill. 623, 626; *City of Dixon* v. *Sinow & Weinman*, 350 Ill. 634, 636-637.)

(3) Where there is no "taking" of property, and the case is one of consequential damages only, the Illinois constitution imposes no requirement to bring condemnation proceedings in advance of making the improvement, and the abutting property owner cannot compel the public authority to institute proceedings to ascertain damages, nor enjoin the improvement for failure to do so, but is remitted to his action at law for damages. (*People ex rel. Pratt* v. *Rosenfield*, 399 Ill. 247, 250-251; *People ex rel. Tyson* v. *Kelly*, 379 Ill. 297, 300-303; *Bay Bottoms Drainage District* v. *Cashe River Drainage District*, 295 Ill. 301, 308; *S. D. Childs & Co.* v. *City of Chicago*, 279 Ill. 623, 627; *South Park Commissioners* v. *Montgomery Ward & Co.*, 248 Ill. 299, 310; *County of Mercer* v. *Wolff*, 237 Ill. 74, 76; *Doane* v. *Lake Street Elevated R. R. Co.*, 165 Ill. 510; *Parker* v. *Catholic Bishop, et al.*, 146 Ill. 158, 165-166; *Penn Mutual Life Ins. Co.* v. *Heiss*, 141 Ill. 35, 55; *Stetson* v. *Chicago & Evanston R. R. Co.*, 75 Ill. 74, 76-77.)

(4) The right to bring an action at law for consequential damages, where there is no actual "taking" of any portion of a complaining owner's property, satisfies the state constitutional guaranty of just compensation and the requirements of due process of law. (*People ex rel. Pratt* v. *Rosenfield*, 399 Ill. 247, 251; *County of Mercer* v. *Wolff*, 237 Ill. 74, 76; *Parker* v. *Catholic Bishop, et al.*, 146 Ill. 158, 165-166.)

(5) Prior to the appearance of the word "damaged" in the just compensation clause of the Constitution of

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1870, no compensation at all was recoverable for consequential damages to property resulting from a public improvement, where no property was actually taken. (*Illinois Power & Light Corporation* v. *Talbott*, 321 Ill. 538, 545-547; *Otis Elevator Co.* v. *City of Chicago*, 263 Ill. 419, 423-424; *Rigney* v. *City of Chicago*, 102 Ill. 64, 81; *Penn Mutual Life Ins. Co.* v. *Heiss*, 141 Ill. 35, at pp. 56-57.)

(6) It was for the very purpose of satisfying and implementing this new constitutional guaranty of just compensation in non-taking cases added by the 1870 Constitution that the common-law action for consequential damages was made available. (*People ex rel. Pratt* v. *Rosenfield*, 399 Ill. 247, 251; *Illinois Power & Light Corp.* v. *Peterson*, 322 Ill. 342, 346-347; *Illinois Power & Light Corp.* v. *Talbott*, 321 Ill. 538, 545; *Penn Mutual Life Ins. Co.* v. *Heiss*, 141 Ill. 35, 56-57).

(7) The five-year statute of limitations has been consistently applied in Illinois to bar actions for consequential damages to property resulting from a public use. (*Schlosser* v. *Sanitary District of Chicago*, 299 Ill. 77, 83; *Shaw* v. *Sanitary District of Chicago*, 267 Ill. 216; *C. & E. I. Ry. Co.* v. *McAuley*, 121 Ill. 160, 163-164; *Monarch Refrigerating Co.* v. *City of Chicago*, 328 Ill. App. 540 (Lv. to app. den.; 331 Ill. App. xiv); *Horner* v. *County of Winnebago*, 332 Ill. App. 217 (lv. to app. den., 334 Ill. App. Adv. Shts. No. 4, p. ii)).

(8) There is no dispute in point of fact, and it is also well settled as a legal proposition, that plaintiffs' cause of action accrued on April 29, 1931, when the viaduct was completed and opened to public travel. From this it follows inescapably that plaintiffs' action was barred because not instituted within five years from that date. (*Schlosser* v. *Sanitary District of Chicago*, 299 Ill. 77, 83; *Chicago, North Shore St. Ry. Co.* v. *Payne*, 192 Ill. 239, 247; *C. & E. I. R. R.*

Co. v. *McAuley*, 121 Ill. 160, 163-164; *Monarch Refrigerating Co.* v. *City of Chicago*, 328 Ill. App. 540 (lv. to app. den.; 331 Ill. App. xiv)).

In the light of the foregoing well-settled State rules of decision, the claim of appellants that the decision at bar constitutes a departure from prior Illinois law is revealed to be without merit.

III

Remitting a property owner, in a non-taking case, to an action at law for his consequential damages, does not infringe upon any of his rights under the due process clause of the Fourteenth Amendment of the Federal Constitution.

As already pointed out above, the claim of appellants that the five-year statute of limitations should not have been applied does not present the question of the validity of the five-year statute, but rather the issue whether a "taking" of property was involved on the facts here presented. We shall now proceed to show that making available an action at law for damages, in a non-taking case, satisfies the requirements of due process of law under the Federal Constitution. This court has had numerous occasions to pass on this precise issue and has repeatedly declared that the grant of such a remedy in such an instance does not involve any denial of due process.

In *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, which involved a proceeding to determine just compensation, the Supreme Court stated that all that was essential to satisfy the requirements of due process of law was that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided for, there is that due process of law which is required by the Federal Constitution.

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After adverting to the rule that, in this class of cases, it would accept the construction placed by the highest court of the State upon its own constitution and statutes as correct (p. 566), this court further stated that a property owner has no federal constitutional right to have the amount of his just compensation finally determined and paid before yielding possession, even in a "taking" case (pp. 567-568). This court then set forth the essential requirements of due process of law under the Federal Constitution, saying (p. 569):

> "All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution. *Bauman* v. *Ross*, 167 U. S. 548, 593."

Finally, with particular reference to the case before it, this court said (p. 575):

> "But a more complete and satisfactory answer is that whatever error there may have been affords no ground for the interference of this court. The respondents were not thereby deprived of any rights secured by the Federal Constitution. They were not denied 'due process of law.' The proceedings were had before a duly constituted tribunal, in accordance with the declared law of the State, with full opportunity to be heard."

In *Osborne* v. *Missouri Pacific Ry. Co.*, 147 U. S. 248, an abutting property owner sought to enjoin the laying of tracks for a steam railroad in a public street fronting on his property, on the ground that there had been no ascertainment or payment of just compensation in advance of the making of the improvement. The damages claimed were that the construction and operation of the steam railroad would prevent free ingress and egress to and from the

street, would occasion noise, smoke and damage from fires, and would cause the abutting structure to shake and vibrate from the passage of engines and cars over the street in proximity to the premises. The trial court ordered the equity suit to be dismissed without prejudice to plaintiff's right to sue at law for the damages claimed to have been sustained. This court affirmed the decree of dismissal, holding that under the Missouri law, which was binding upon this court, an owner whose property was not taken but merely suffered consequential damages as a result of a public improvement was not entitled to have his compensation ascertained or paid in advance of the making of the improvement, but possessed an adequate remedy by an action at law, for damages. At page 259, this court said:

> "But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial and the remedy at law in fact inadequate before restraint will be laid upon the progress of a public work. And if the case made discloses only a legal right to recover damages rather than to demand compensation, the court will decline to interfere."

We submit, in the light of the foregoing, that the adequacy of the legal remedy available to appellants under Illinois law is not open to doubt, and that there is no merit in the contention that appellants suffered any deprivation of rights guaranteed by the Federal Constitution by being required to resort to an action at law to recover their consequential damages. Indeed, the provision for the recovery of consequential damages, from the standpoint of federal constitutional guarantees, would seem to be supererogatory,—the grant of a right out of a sense of fairness but not out of

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constitutional necessity. As this court said in *Ettor* v. *City of Tacoma*, 228 U. S. 148, at p. 150:

> "In the absence of legislation requiring compensation for such damage the general rule of law is that a municipality in making, grading and improving streets is the agent of the State, exercising in the performance of such work a governmental power, and is not liable for consequential injuries to property abutting, if it keep within the street and use reasonable care and skill in doing the work. 4 Dillon Municipal Corporations, 5th ed., §§ 1674; *Smith* v. *Corporation of Washington*, 20 How. 135; *Transportation Co.* v. *Chicago*, 99 U. S. 635, 641; *Humes* v. *Knoxville*, 1 Humph. (Tenn.) 403."

Since appellants could not have claimed a violation of federal constitutional guaranties even had the Illinois law denied them all right to compensation for consequential damages, it is even more clear that they have suffered no unconstitutional deprivation by being remitted to their action at law for damages, with the right which it affords to a jury trial.

IV

To apply the bar of the five-year Illinois statute of limitations is not so burdensome or unreasonable a restriction upon the exercise of the right granted to bring an action at law for damages in a "non-taking" case as to constitute any denial of due process of law under the Federal Constitution.

Much of appellants' argument is premised upon the contention that to have limited them to the five-year period of limitations somehow deprives them of substantial rights under the Federal Constitution. It has already been amply demonstrated that no constitutional rights of appellants have been invaded by application of the bar of the five-year statute of limitations.

In considering whether appellants have actually been put to any disadvantage, even as compared to persons whose property had actually been taken by the street improvement in question, it is important to bear in mind that appellants had five years *after the completion of the improvement* within which to bring their action. In point of fact, therefore, appellants possessed a distinct advantage over the property owners whose property was taken and who were therefore made parties to the condemnation proceedings prior to or during the making of the improvement. Such parties to the proceeding were necessarily compelled to predict what the full extent of their damages would be by reason of the improvement which had not yet been put into operation. On the other hand, appellants here had the opportunity to determine, within five years after the improvement was completed and in operation, what the full extent of the damages to their property would be. It is submitted, therefore, that appellants cannot successfully urge that they have suffered any disadvantage by reason of the application of the five-year limitation period to their cause of action. It is clear that appellants have suffered no practical detriment by being limited to their common-law action for damages and by being required to bring it within five years after its accrual. They likewise cannot successfully urge that they have been deprived of any legal or constitutional rights by reason thereof. The opinion of the Supreme Court of Illinois rendered in the case at bar points out that there is no constitutional right to a particular length of a period of limitations, just so the period is reasonable. (Citing *Burrill* v. *Locomobile Co.*, 258 U. S. 34.)

In *O'Neil* v. *North Colorado Irrigation Company*, 242 U. S. 20, plaintiff brought suit to quiet title to alleged water rights on a certain creek and to enjoin the defendant from closing plaintiff's ditch under an assertion of a superior

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right. The defendant justified under a judicial decree establishing its priority to the waters of the creek and under a state statute making the decree conclusive *after four years from its rendition* even as against persons (like plaintiff) whom the statute did not require to be made parties to the proceedings because residing in a different water district. The plaintiff contended that to invoke the decree, to which he was not a party, against him, and to apply the four-year statute to bar his water right which was conceded to be an interest in real property), deprived him of his property without due process of law.

This Court held that the four-year period was not an unreasonable limitation, and that the application of the bar of the statute against the plaintiff did not invade his constitutional rights, and the fact that he was not entitled to a hearing in the proceedings in which the decree was rendered was not a valid objection, since he had four years thereafter within which to have a hearing in an action brought at his own instance. This Court said, at page 26:

> "So far as the last objection goes the answer is that if it be true that the plaintiff was not entitled to be heard on the defendant's decree, still there was nothing to hinder the State from providing that if he took no step to assert his rights within a reasonable time after the judicial assertion of an adverse title, the decree being a public fact, he should lose those rights. See *Barker* v. *Harvey*, 181 U. S. 481; *Soper* v. *Lawrence Brothers Company*, 201 U. S. 359; 367; 368; *American Land Co.* v. *Zeiss*, 219 U. S. 47, 60; *Montoya* v. *Gonzales*, 232 U. S. 375, 378."

And so here, the appellants had five years after completion of the improvement within which to bring their action for damages, if any, and the fact that they were not made parties to the condemnation proceedings gives them no ground to urge that the application of the five-year bar of

Section 15 of the Illinois Limitations Act infringes upon their constitutional rights.

Conclusion

It is respectfully submitted that the questions raised by the appellants, on which the decision of the cause depends, are so wanting in substance as not to require further argument. A motion to dismiss or affirm is therefore presented herewith.

Respectfully submitted,

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L. LOUIS KARTON,
Head of Appeals and Review Division;
ARTHUR MAGID,
Assistant Corporation Counsel,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 472

BETTY STODDARD HORN, BARBARA STODDARD KIRKLAND, LOUIS E. STODDARD JR.; AND ETHEL S. GARRETT AND THE UNION TRUST COMPANY OF PITTSBURGH, AS CO-EXECUTORS AND CO-TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF HARRY DARLINGTON, JR., DECEASED, *Appellants,*

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION, *Appellee*

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 30880

THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY

MOTION OF APPELLEE TO DISMISS OR AFFIRM

MAY IT PLEASE THE COURT:

Comes now the City of Chicago, a municipal corporation, appellee herein, by Benjamin S. Adamowski, its corporation counsel, and moves the court to dismiss with costs the appeal taken herein to this court by Betty Stoddard Horn, Barbara Stoddard Kirkland, Louis E. Stoddard, Jr., and Ethel S. Garrett and The Union Trust Company of Pittsburgh, as

Co-executors and Co-Trustees under the Last Will and Testament of Harry Darlington, Jr., Deceased, appellants herein, upon the following grounds:

(1) The judgment of the Supreme Court of Illinois here appealed from was not rendered in a case where there was drawn in question the validity of a state statute on any ground of repugnancy to the Federal Constitution, nor did it constitute a decision in favor of the validity of any state statute.

(2) The judgment of the Supreme Court of Illinois was based primarily upon determinations of questions of local law not open to re-examination in this court.

(3) No substantial federal question affording a basis for a review by this court is presented on this record.

In the alternative, appellee moves this court to affirm the judgment of the Supreme Court of Illinois on grounds (2) and (3) aforementioned, and on the additional ground that the federal questions which appellants seek to raise in this court are no longer debatable in view of the prior decisions of this court, and that the decision of the Supreme Court of Illinois is in all respects in conformity with the rulings of this court upon such questions.

Respectfully submitted,

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Chicago 2, Illinois,
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L. LOUIS KARTON,
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